No. 03-935

Supreme Court, U.S.
FILED
FEB 27 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COLONEL KURT F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; BRIG. GEN. W. T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; MO-ARK ASSOCIATION; STATE OF NEBRASKA; AND THE STATE OF MISSOURI; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

ROBERT J. VINCZE
Counsel of Record
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, Colorado 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540

ELLIOT H. SCHERKER
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

Counsel for Respondent MO-ARK Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

CORPORATE DISCLOSURE

Pursuant to Rule 29(6), Respondent MO-ARK Association makes the following Corporate Disclosure Statement:

A. The MO-ARK Association is a voluntary, non-profit corporation organized and operating under the laws of the State of Kansas which promotes flood control, navigation, irrigation, recreation, fish and wildlife, the environment, conservation and the beneficial use of land and water resources within the Missouri River Basin and the portion of the Arkansas River Basin that runs through Kansas and Missouri.

B. The MO-ARK Association does not have any corporate parents.

C. As a non-profit corporation, the MO-ARK Association does not issue stock, and, therefore, no publicly-held company owns any stock in the MO-ARK Association.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
1. The primary issues in the decision below do not raise the Question Presented	7
2. The Question Presented requires fact-bound judgments	9
3. The record does not raise the Question Presented	10
4. An administrative process is ongoing	11
5. The Eighth Circuit's decision does not conflict with a decision of the Supreme Court	12
6. The Eighth Circuit's decision was correctly decided	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed 2d 898 (1988) 12, 13

South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003) 4, 13

FEDERAL STATUTES AND RULES

Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) 7, 12, 13, 17

Missouri River Main Stem Reservoir System Reservoir Regulation Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, 1979 ("1979 Master Manual") 2, 3, 11, 14

Missouri River Main Stem Reservoir System Reservoir Regulation Manual, Master Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, December 1960 ..... 14, 17

MISCELLANEOUS

Congressional Record, 78th Cong., 2d Sess., January 13, 1944, p. 151 17

Flood Control Act of 1944, H.R. 4485, 78th Cong., 2d Sess. (1944) 15

Interior on the Bureau of Reclamation's Plan for Basin Development. Joint Report – S. Doc. 247, 78th Cong., 2d Sess. 3 (1944) 14

TABLE OF AUTHORITIES – Continued

Page

Joint Hearing on Missouri Basin Water Problems, 85th Cong., 1st Sess., 418-430 (1957) (statement of the Chief of Engineers) 16

Missouri River Revised Draft Environmental Impact Statement, Master Water Control Manual Review and Update, U.S. Army Corps of Engineers, Northwest Division, August 2001 2

Office of Counsel, Department of the Army, "The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River" 25 (August 6, 1990) 15

Pick Plan – H. Doc. 475, "Missouri River Basin," Letter from the U.S. Army Chief of Engineers, with Report on a Review of Reports on the Missouri River for Flood Control from Sioux City, Iowa to the Mouth; 78th Cong., 2d Sess., March 2, 1944 14

Sloan Plan – S. Doc. 191, "The Missouri River Conservation, Control, and Use of Water Resources of the Missouri River Basin in Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Iowa, and Missouri." Report of the Secretary of the Interior on the Bureau of Reclamation's Plan for Basin Development. Joint Report – S. Doc. 247, 78th Cong., 2d Sess. 3 (1944) 14

Sax, Joseph L., et al., Legal Control of Water Resources 644 (2d ed. 1991) at 165, 971 16

STATEMENT OF THE CASE

The provincial picture painted by the Dakotas is in need of correction. Pet. 8, 9. Please note the following facts.

The subject case arises out of administrative decisions regarding the management of the Missouri River, which runs through seven states from Montana to Missouri. In 2002, the U.S. Army Corps of Engineers ("Corps") chose to lower a single reservoir, Lake Oahe, and to hold water levels in the other five reservoirs constant to maintain downstream river flow. Pet App. 3, 4, 7. The year 2002 was one of regional drought. *Id.*

To frame the decisions, the Corps operates six dams and reservoirs on the main stem of the Missouri River. They are Fort Peck Dam and Lake in Montana, Garrison Dam and Lake Sakakawea in North Dakota, Lake Oahe in North Dakota and South Dakota, Big Bend Dam and Lake Sharpe in South Dakota, Fort Randall Dam and Lake Francis Case in South Dakota, and Gavins Point Dam and Lewis and Clark Lake in Nebraska and South Dakota. Pet. App. 4. The navigation channel runs from Sioux City, Iowa to the confluence of the Missouri and Mississippi Rivers at St. Louis, Missouri. Municipalities, power plants, industry, terminals and farms are located along the Missouri River.[1]

Pursuant to the authorities arising under the Flood Control Act of 1944, the Corps adopted and published a revised Master Manual in 1979 for the purpose of operating the main stem Missouri River reservoirs. Each year the Corps adopts a Missouri River Main Stem System

---

[1] *See* references to Appendix *infra*.

Annual Operating Plan ("AOP") pursuant to the Master Manual for the purpose of providing more precise reservoir operating instructions. The Corps's decision to lower Lake Oahe was made in accordance with its 2002 AOP. Pet. App. 7. Legal action followed.

In late April of 2002, the State of South Dakota filed a complaint in the United States District Court of South Dakota, Central Division, seeking an order restraining the Corps from altering the level of Lake Oahe in North and South Dakota to protect South Dakota's interest in recreational fishing. Shortly thereafter, South Dakota amended its Complaint to prevent the Defendants from altering the levels of any of the main stem reservoirs lying upstream of Nebraska. A temporary restraining order was followed by a preliminary injunction. Pet. App. 35, 49. Other parties sought and obtained injunctive relief in other District Courts. Pet. App. 9.

With respect to economic facts, a national perspective is in order. One way to value uses of the system is to determine their National Economic Development ("NED") benefits.[2] The Corps's stated NED benefits in the Revised Draft Environmental Impact Statement ("RDEIS")[3] for

---

[2] A few words of caution. The methods to determine NED benefits vary among uses, and NED benefits for different uses are not properly additive. NED benefits also do not reflect impacts on regional economies. Further, various parties including the Respondent, MO-ARK Association, have questioned the following numbers on the administrative record for the Review and Update of the Missouri River Main Stem Reservoir System Reservoir Regulation Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, 1979 ("1979 Master Manual").

[3] Missouri River Revised Draft Environmental Impact Statement, Master Water Control Manual Review and Update, U.S. Army Corps of Engineers, Northwest Division, August 2001, Table 5.13-1.

recreation are $84.7 million per year under the 1979 Master Manual. In contrast, the stated annual average benefits under the 1979 Master Manual for other major uses are as follows: for flood control, $410.3 million; for water supply, which includes municipal water supply, irrigation, cooling water, and commercial, industrial and domestic uses, $611.06 million; for navigation, $7 million; and hydropower, $741.52 million.

What is more, approximately $20 million of the NED benefits for recreation are attributed to recreation below the Gavins Point Dam, the last dam in the system. One must further reduce the number for recreation benefits to account for recreation on the upper river. This leaves the stated NED benefits for recreation on the Oahe, Garrison and Ft. Peck reservoirs under the 1979 Master Manual at only $31.4 million per year.[4]

The MO-ARK Association, Ergon Asphalt and Emulsions, Inc., and other corporate entities submitted evidence to the South Dakota District Court with their motions to intervene.[5] This evidence substantiated the following injuries from the reduction in flows sought by South Dakota:

1. Decreases in water quality and increases in treatment costs at water treatment facilities (Schrempp Aff. ¶¶ 3, 4,

---

[4] *Id.* at Table 5.11-1.

[5] Please note that the MO-ARK Association also intervened in the District of Nebraska suit brought by the State of Nebraska (02-2191NE). Pet. 10. The MO-ARK Association filed similar evidence in support of both motions to intervene.

Appendix[6] Ex. No. 17; Pogge Aff. ¶¶ 3, 4, Appendix Ex. No. 17; Cieslik Aff. ¶ 29, Appendix Ex. No. 21).

2. Restricted ability of St. Louis, Kansas City and Jefferson City, Missouri to draw drinking water from the Missouri River and harm to endangered and threatened species (Mahfood Aff., Appendix Ex. No. 17).

3. Shipping delays that would severely damage river terminal operations, causing the loss of jobs and income, and reducing the supply of fertilizer available to farmers (LaMothe Aff. ¶¶ 5-9, Appendix Ex. No. 17).

4. Damage to barges and tow boats that will settle on the bottom of the Missouri River, possibly leaking hazardous cargo (Blaske Aff. ¶¶ 5, 10, Appendix Ex. No. 17; Cieslik Aff. ¶ 21, Appendix Ex. No. 21).

5. Loss of revenue of over $800,000 for one tow barge operation, leading to the loss of jobs and the potential failure of the business (Blaske Aff. ¶¶ 7, 11, Appendix Ex. No. 17).

6. Higher fertilizer costs, lower grain prices and lower farm income (Jackson Aff. ¶¶ 2-4; Waters Aff. ¶¶ 2-4; Johnson Aff. ¶¶ 2-4; *The Impact to Missouri Agriculture of Reduced Waterflow on the Missouri River,* prepared by the Missouri Department of Agriculture, June 1991; all at Appendix Ex. No. 17).

---

[6] "Appendix" in this statement of facts refers to the Joint Appendix in the record before the Eighth Circuit Court of Appeals, *South Dakota v. Ubbelohde.*

7. Negative impacts on the storage and distribution of liquid asphalt products from Exxon-Mobil and others to highway contractors in a several state area, including the states of South Dakota, Iowa, Minnesota and Nebraska, which product is shipped by barge. In addition, highway contractors, State Departments of Transportation and city and county governments may likely experience delays in their construction projects and suffer increased costs (Cheever Aff., Appendix 170).

8. The interstate shipment of goods would be interrupted (Butterfield Aff., Appendix at 174).

9. A shut down of commercial navigation on the Missouri River until the second week of June would cause a loss of revenue of approximately $1,280,000 to the Magnolia Marine Transport Company (Humphreys Aff., Appendix at 176).

10. Koch Materials Company will be required to use trucking or rail as an alternate means of supplying asphalt at an increased cost of approximately $150,000 through May 31, 2002 and at an increased cost of approximately one million dollars annually if the Corps is enjoined for an extended period (Hamman Aff., Appendix at 178).

11. Phillips 66 Company sells asphalt products to the highway construction industry through a terminal at Kansas City which relies on over 95% of its supply moving by barge on the Missouri River from its refinery at Wood River, Illinois. The direct financial impact of using more expensive rail car and truck transportation is calculated to exceed $350,000. Shipping by rail is approximately double the cost, and shipping by truck is approximately three times the cost as shipping by water. Should the closure of

the navigation channel extend longer, there would be a high probability that Phillips 66 Company could not keep up with demand to re-supply the terminal (Haverland Aff., Appendix at 183).

Based on the above-referenced affidavits and report, navigation on the Missouri River has not peaked as stated by South Dakota and North Dakota. In addition, goods and commodities other than grain are shipped on the Missouri River, e.g. asphalt, steel, equipment, road salt, cement, fertilizer, sand and gravel.

Moreover, the statement by North and South Dakota regarding the ruling by the Eighth Circuit is incomplete. Pet. 13, 14. Importantly, the ruling was based on more than adverse impacts to navigation. "Ultimately, downstream flows were reduced, and navigation and other downstream interests suffered." Pet. App. 10.

The Eighth Circuit reversed the South Dakota District Court's denials of the motions to intervene. Pet. App. 18. In doing so, the Eighth Circuit based its finding that the proposed intervenors had standing on "evidence that a reduction in the flow of the River would cause a great deal of harm to downstream interests." Pet. App. 14.

> They [the proposed intervenors] offered to present significant evidence that a reduction in the flow of the River would cause a great deal of harm to downstream interests. Among the threats were an interruption in their ability to navigate the River, problems for power plants that relied upon the River water for cooling, and decreases in water quality for community water supplies. Moreover, the parties presented

> evidence that decreasing the flow for even a short period of time could be troublesome because of the effects that such a short-term reduction could have on wildlife. Specifically, the parties presented evidence that if the water levels were decreased, two endangered species of birds would nest on the newly exposed river bed. Once the birds nested, the proposed intervenors feared, the water flow could not be increased until after the fledgling birds could leave the nest. Thus, according to this argument, flow reduction could not be limited to a short term.

Id.

REASONS FOR DENYING THE PETITION

1. The primary issues in the decision below do not raise the Question Presented.

The sole Question Presented in the Petition (p. i) is whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

(1) To the contrary, the primary question addressed by the Eighth Circuit was whether there is law to apply to subject the Corps's actions to judicial review. Pet. App. 20, 21. Finding that the "Flood Control Act clearly provides some law to apply," and that the Master Manual is binding on the Corps, the Eighth Circuit proceeded to address the standards "that courts regularly employ in reviewing agency action." Pet. App. 21, 27. The opinion on the standards for judicial review of agency action is not novel and does not raise the Question Presented.

(2) Next, the Eighth Circuit disposed of South Dakota's judicial estoppel theory, a theory based upon an alleged agreement reached in previous litigation in Montana. Pet. App. 28. "South Dakota maintains, the Corps agreed to give all interests, including recreation, equal consideration in the management of the River – as opposed to giving flood control, navigation, or other interests priority over recreation – until the revision of the Master Manual was complete." Pet. App. 28. North Dakota made a similar argument in favor of affirming the injunction entered in North Dakota. Pet. App. 31. This issue was decided on the facts and the nature of the Corps's agreement. The Eighth Circuit found that "[e]qual consideration does not mean equal results." Pet. App. 29. Since the Eighth Circuit ruled that there is no evidence that the Corps did not give equal consideration to recreation, it did not reach the question of whether the elements of judicial estoppel were met. *Id.* Clearly, a fact-bound determination of the import of an agreement does not raise the Question Presented.

(3) The third primary issue the Eighth Circuit considered was "whether the Corps's decision to lower Lake Oahe in the Spring of 2002 to maintain downstream navigation was arbitrary and capricious." Pet. App. 30. North Dakota raised a similar argument. The court found that the policy choice was not arbitrary and capricious in that the Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. *Id.* Whether there was a rational basis for a distinct policy decision does not raise the Question Presented.

2. The Question Presented requires fact-bound judgments.

The terms "consistent allocation" and "at the expense of" in the Question Presented are fact-bound determinations that are not appropriate for review by this Court. The answer to such a question only could involve judicial review of every decision by the Corps, a standard which the Eighth Circuit rejected.

> South Dakota maintains that the sum total of this legislative history compels the Corps to balance the interests each year so as to maximize each category of benefits, and that the courts can review the annual operating plans to ensure that they do indeed maximize the benefits. . . . We reject this argument. South Dakota's proffered standard – whether the Corps's management of the River maximizes the benefits to all interests – is not the kind of standard that courts regularly employ in reviewing agency action. . . . Under South Dakota's proffered standard the Corps's actions would receive no deference and the courts could be called upon to review every decision that the Corps makes, no matter how minute.

Pet. App. 27, 28. That the Dakotas' goal in seeking *certiorari* is judicial review of every decision that the Corps makes is evidenced by the last sentence in their Petition: a call for "judicial supervision of military officers." *Id.*

3. The record does not raise the Question Presented.

It is erroneous to portray the conflict in this matter as upstream recreation in the reservoirs versus navigation. Flows necessary to support navigation also foster flood control and benefit power supply, downstream municipal and industrial water supply (including electric power generation) and water quality, downstream recreation, agriculture and interior drainage. As set forth in the Statement of the Case above, the benefits attributed to these interests dwarf the economic benefit from reservoir recreation to the fine States of Montana, North Dakota and South Dakota. What is more, the Eighth Circuit found that more than navigation suffered as a result of the injunctive relief granted to the upstream states: "navigation and other downstream interests suffered." Pet. App. 10.

In the preamble of its opinion (Pet. App. 4), the Eighth Circuit states that the action arose out of a decision by the Corps "to release water from a single reservoir, Lake Oahe, to maintain downstream river flow."

> The policy choice that South Dakota is challenging is not arbitrary and capricious. The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. The Corps had evidence that every reservoir did not need to have a good spawn each year to maintain fish stocks. . . . The Corps decided to alternate the harm among the reservoirs, maintaining the water level at all but one reservoir each year. This plan would presumably allow each reservoir to have a fruitful spawn five out of every six years even in the worst drought conditions. This plan was eminently rational. South Dakota's efforts to increase the rainbow smelt stock during the Spring of 2002 do not make the

> plan irrational. . . . Moreover, if Lake Oahe had been lowered as planned in 2002, it presumably would not be lowered in 2003, which would allow for a fruitful spawn this year.

Pet. App. 30, 31. As the Eighth Circuit found, the Corps's plan would allow for fish spawns at Lake Oahe in five out of every six years even in the worst drought conditions. Quite clearly, the facts before the Eighth Circuit did not raise the question of the Corps's *consistent* allocation of water from the reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation.

4. An administrative process is ongoing.

While the upstream states seek to benefit from stable or rising pool levels in the spring and summer to serve recreation, such a policy has great impacts on other uses, especially in times of drought. Here, there are debatable policy considerations at issue. The Corps is currently wrestling with these policy issues in the midst of the review and update of the 1979 Master Manual.[7] Subject to judicial review, such decisions involving agency expertise are not within the province of this Court.

---

[7] Missouri River Master Water Control Manual Review and Update.

5. The Eighth Circuit's decision does not conflict with a decision of the Supreme Court.

North and South Dakota do not assert that the Eighth Circuit's decision conflicts with any other court of appeals, and their assertion that the Eighth Circuit misread *ETSI Pipeline Project v. Missouri*, is misplaced. Pet. 26, 27. In addressing the question of whether there is law to apply for the purpose of judicial review, the Eighth Circuit states that the Flood Control Act:

> lays out purposes that the Corps is to consider in managing the River. The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for. Flood Control Act Section 4, 58 Stat. at 889-90. The text of the Flood Control Act thus sets up a balance between flood control, navigation, recreation, and other interests.

Pet. App. 21.

Earlier in the opinion, the Eighth Circuit considers the language in the Flood Control Act relating to project purposes and congressional intent:

> The Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). The Act's dominant functions were expressed repeatedly in

> three Congressional Documents: Senate Documents 191 and 247 and House Document 475. See Flood Control Act Section 9, 58 Stat. at 891.

Pet. App. 5.

The Eighth Circuit's statements regarding *ETSI Pipeline Project v. Missouri* are accurate and do not conflict with the holding in such case. 484 U.S. 495, 512, 108 S. Ct. 805, 98 L.Ed.2d 898 (1988). The Supreme Court states that "[t]he Sloan Plan recognized that the 'dominant function' of Lake Oahe would be flood control and navigation, and therefore these projects would come under the jurisdiction of the Army and its Corps of Engineers." *Id.* at 512. The Eighth Circuit's reference to this passage is entirely appropriate since the issue before the Eighth Circuit related to the Corps's discretion for actions within its jurisdiction.

Furthermore, the Eighth Circuit's opinion does not conflict with the holding in *ETSI*. Indeed, the Eighth Circuit's decision and this Court's affirmation of the Eighth Circuit's decision in *ETSI* share common ground in that both decisions evince standards to avoid "review [of] every decision" and "endless squabbles." *Ubbelohde,* 330 F.3d at 1031; *ETSI*, 484 U.S. at 515, 108 S.Ct. at 816.

6. The Eighth Circuit's decision was correctly decided.

The Eighth Circuit correctly stated that flood control and navigation are dominant functions under the Flood Control Act of 1944. Pet. App. 5. The Flood Control Act of

1944 adopts the priorities set forth in the Pick-Sloan Plan.[8] The Joint Report or Pick-Sloan Plan lists the purposes of the upstream reservoirs as "flood control, irrigation, navigation, hydroelectric power, and other uses" in that order. These established priorities are properly set forth in the subject 1979 Master Manual, which the Eighth Circuit deemed binding. Pet. App. 26. Furthermore, these priorities are consistent with those in the first manual published in 1960.[9]

The 1979 Master Manual lists the priorities for operation of the main stem system as follows:

> *First*, "flood control will be provided for by observation of the requirement that an upper block of this intermediate storage space in each reservoir will be vacant at the beginning of each year's flood season, with evacuation scheduled in such a manner that flood conditions will not be significantly aggravated if at all possible"; *Second*, "all irrigation, and other upstream water uses for beneficial consumptive purposes";

---

[8] Pick Plan – H. Doc. 475, "Missouri River Basin," Letter from the U.S. Army Chief of Engineers, with Report on a Review of Reports on the Missouri River for Flood Control from Sioux City, Iowa to the Mouth; 78th Cong., 2d Sess., March 2, 1944; Sloan Plan – S. Doc. 191, "The Missouri River Conservation, Control, and Use of Water Resources of the Missouri River Basin in Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Iowa, and Missouri." Report of the Secretary of the Interior on the Bureau of Reclamation's Plan for Basin Development. Joint Report – S. Doc. 247, 78th Cong., 2d Sess. 3 (1944).

[9] Missouri River Main Stem Reservoir System Reservoir Regulation Manual, Master Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, December 1960, at Section IX, 9-3.

> *Third*, "downstream M&I [municipal and industrial] water supply and water quality requirements"; *Fourth*, "the remaining water supply available will be regulated in such a manner that the outflow from the reservoir system at Gavins Point provides for equitable service to navigation and power"; *Fifth*, "efficient generation of power to meet the area's needs consistent with other uses"; and *Sixth*, and last, "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife."

Section IX.

That the Corps must continue to abide by the priorities established by Congress is supported by the Corps's past responses to issues about the operation of the system. The Corps's own legal counsel has claimed that "any revision involving a significant determent to one or more of the actual purposes of the currently settled priorities of the system would suggest the need for prior congressional authorization."[10]

Furthermore, the O'Mahoney-Millikin Amendment,[11] codified in the Flood Control Act of 1944 at 33 U.S.C. § 701-1(b), does not support elevating the interest of

---

[10] Office of Counsel, Department of the Army, "The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River" 25 (August 6, 1990).

[11] Flood Control Act of 1944, H.R. 4485, 78th Cong., 2d Sess. (1944).

recreation above its status as a "lower priority."[12] The amendment reads in relevant part as follows:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in states wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in states lying wholly or partly west of the ninety-eighth meridian of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.

Granted, the reservoirs are located in States that lie "wholly or partly west of the ninety-eighth meridian," but recreation is not a "beneficial consumptive use." The term consumptive use is defined as "the amount of water consumed by a particular use and thus unavailable for further use."[13] Since recreation is not a beneficial consumptive use, it is not entitled to priority over navigation.

Furthermore, the Dakotas improperly seek to use the language in the Declaration of Policy in the 1944 Act to support elevating the interest of recreation. The Declaration states that it is the policy of the Congress:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, . . . to facilitate the

---

[12] Joint Hearing on Missouri Basin Water Problems, 85th Cong., 1st Sess., 418-430 (1957) (statement of the Chief of Engineers).

[13] Sax, Joseph L., et al., Legal Control of Water Resources 644 (2d ed. 1991) at 165, 971.

> consideration of projects on a basis of comprehensive and coordinated development; and to limit authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.[14]

The navigation works for the main stem system were authorized and in part constructed at the same time or prior to the Flood Control Act of 1944. The construction of the nine-foot navigation channel on the Missouri River from Sioux City to St. Louis was included in the House Rivers and Harbors Committee's omnibus bill for waterways projects in 1944.[15] Therefore, a cost-benefit approach is unavailable to justify additional water for recreation over the needs of Missouri River navigation. Further, as shown above, navigation flows support other uses that are economically more important than reservoir recreation.

Lastly, the fact that irrigation in the upstream states has not developed due to poor soil conditions does not change the priorities set forth in the Flood Control Act of 1944 and the Master Manual. Again, irrigation is a beneficial consumptive use but not recreation.

---

[14] 33 U.S.C § 701-1, c. 665 § 1, 58 Stat. 887 (Dec. 22, 1944).

[15] Congressional Record, 78th Cong., 2d Sess., January 13, 1944, p. 151.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT J. VINCZE
Counsel of Record
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, Colorado 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540

ELLIOT H. SCHERKER
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

Counsel for Respondent
MO-ARK Association